of television households in the market, cable penetration and ethnic composition, that could have an effect on the ratings of particular programs.[28]

LECG's analysis shows that the UHF handicap persists:

> The regressions show that broadcasting on a UHF channel decreases the program's ratings for each day and half hour studied. . . . The range of ratings decreases are from four ratings points in Wednesday's two half hours to one rating point in the second half hour of Monday.

Id. at 43-44. These represent very substantial differentials, and confirm that a UHF handicap persists. There is no reliable data in the networks' comments or EI's Report that discredits this conclusion, and both economic data and observation of the industry confirm it.[29] Indeed, even the established networks are openly scornful of their UHF affiliates; a CBS spokesperson recently called its new UHF affiliate in Atlanta "a large megaphone on top of a hill."[30]

(4) Independent Stations Are Far Less Profitable than Network Affiliates.

EI concedes that

> "[i]nfant industry protection . . . can provide net economic benefits to society if some firms could not otherwise weather initial competitive pressures and need time to develop to minimum

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[28] See LECG Report at 41-44 and Appendix C at 28-34.

[29] See Viacom Comments at 10-13, 28-29.

[30] Rathbun, Public TV Solution Not As Simple as V's, U's, *Broadcasting and Cable*, Apr. 3, 1995, at 79. CBS's declaration that the UHF handicap "can empirically be shown to be substantially a thing of the past," CBS Comments at 21-22, is somewhat surprising given the precipitous ratings declines of its programming since CBS's substitution of UHF affiliates for VHF affiliates in Detroit, Atlanta, Cleveland and Milwaukee. The ratings of CBS's prime time programming have declined from 60% (in Atlanta) to 73% (in Milwaukee) since the UHF substitutions, and its evening news ratings have declined from 69% (in Cleveland) to 87% (in Milwaukee). *NSI*, February 1994 and February 1995. Even so, these CBS affiliates retain a substantial advantage over the affiliates of emerging networks because the major networks have nationwide coverage, extensive program schedules, and have had 50 years to build their network identities.

> efficient size. In some cases the gains to consumers in future competition from the nurtured "infants" can warrant a temporary government-mandated lessening in competition."[31]

Yet it argues that independents "as a group" have grown strong and will not be "inappropriately disadvantaged if PTAR is removed."[32] Further, EI argues that PTAR reduces the competitiveness of affiliates and their networks and "threaten[s] the vitality of free, over-the-air television."[33] To support these contentions, EI cites statistics comparing cash flows of affiliated and independent stations.

EI's comparisons of the cash flows of affiliates and independent stations are not valid. Its comparison of <u>VHF</u> independents to <u>all</u> of the affiliates of ABC, CBS and NBC is meaningless because the relatively few independent VHFs are almost all located in the largest markets.[34] Television stations in the largest markets, whether affiliates or independents, tend to be much more profitable than stations in smaller markets.

Even EI's comparison of all independent stations to all ABC, CBS and NBC affiliates is skewed by the distribution of those stations among large and small markets. While the network affiliates are evenly spread throughout markets of all sizes, independent stations are more heavily concentrated in larger markets than smaller markets.[35] EI's comparison is not meaningful because large market independents do not compete with smaller market affiliates. Outside the ten largest markets, independent stations have far lower cash flows, on average,

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[31] EI Report at 51.

[32] <u>Id.</u>

[33] <u>Id.</u> at 52.

[34] <u>See</u> EI Report at 53.

[35] <u>See</u> INTV Reply Comments.

than their affiliate competitors.[36] Even in the top-10 markets, the cash flow of the average independent station is considerably lower than the cash flow of the average network affiliate.[37]

B. PTAR Has Not Caused a Long-Term Decline in Television Viewing.

EI provides selected data measuring nationwide households using television ("HUTs") as a percentage of total television households to support its argument that PTAR has caused a long-term decline in television viewing during the prime time access period and the first hour of prime time. EI examines data which measure the percentage of television households that watched television during the second half hour of the access period and the first hour of prime time during two television seasons shortly following the effective date of PTAR: the 1971/72 and 1976/77 television seasons.[38] EI argues that the decline in HUTs after PTAR went into effect demonstrates the "social costs and viewer harm caused by the Rule."[39]

The small decline in households using television during the access period and the first hour of prime time following the implementation of PTAR was nothing more than a temporary

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36 See id.

37 See id.

38 The first data compare HUTs for the 7:30 p.m.- 8:00 p.m., 8:00 p.m. - 8:30 p.m., and 8:30 p.m. - 9:00 p.m. time periods during the first television season that PTAR went into effect -- 1971/72 -- to HUT data for the same time periods during the two prior seasons. See EI Report at 36-37. The networks continued to program the 7:30 p.m. - 8:00 p.m. time period on Tuesday evenings during the 1971/72 season as part of their 7:30 p.m. - 10:30 p.m. block of prime time programming. Id. EI states that this data shows that while HUTs declined slightly on Tuesday evenings in the 1971/72 season during the time period when network programming continued to be presented, HUTS declined substantially more during the time periods on other weekday evenings when network programming was removed. See id. EI also points to data showing that television viewing during the second half hour of the access period was about 1.5% lower during the 1972/73 and 1976/77 seasons than it was for the same time period prior to adoption of PTAR. Id. at 37-40.

39 Id. at 37.

and entirely predictable phenomenon as stations and program suppliers adapted to the new regulatory regime and worked to develop new sources of programming. New programs, much less new program sources, do not appear overnight. In adopting PTAR, the Commission hoped to jump start the development of a new first-run syndicated programming industry that had virtually disappeared.[40] The Commission did not expect that programming comparable to that developed by mature networks over many years would suddenly appear miraculously like Lazarus rising from the dead.

Moreover, while the rule first restricted first-run network programming during the 1971/72 season and off-network programming during the 1972/73 season, continuing legal challenges and a series of proceedings modifying the rule created considerable uncertainty about its future until 1975, when the Commission adopted final rules and terminated the proceeding. The Commission observed in 1975 that continuing uncertainties over the fate of PTAR had "undoubtedly had a discouraging effect on investment in the development of programs other than those most easily produced and readily saleable."[41] Thus, the relatively modest decline in television viewing identified by EI simply reflects the fact that new first-run syndicated programs attractive to viewers had not yet had a chance to develop by the 1975/76 television season.

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40 See 1970 Order at 394-97.

41 Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, 50 FCC 2d 829, 837 (1975). Indeed, the Department of Justice filed comments in that proceeding urging the Commission to reaffirm PTAR with an explicit statement that it would be retained for at least five years so as to afford the degree of stability and certainty necessary to foster the development of a new first-run production and syndication industry. See id. at 855.

A review of HUT data for more recent television seasons reveals why EI's Report does not discuss HUT data beyond the 1975/76 season. Nielsen data compiled by King World and filed with its reply comments in this proceeding shows that HUTs had been completely restored to their pre-PTAR levels by the 1984/85 television season.[42] That restoration completely undermines EI's argument that PTAR caused a long-term decline in viewer welfare as reflected in the number of viewers interested in watching television.[43]

II. REPLY TO THE DISNEY COALITION

A. There Is No Public Policy Justification for Repealing the Off-Network Restriction.

The Disney Coalition, which is comprised of off-network syndicators like The Walt Disney Company and affiliates of ABC, CBS and NBC, would like to see the Commission eliminate PTAR's off-network restriction in order to "restore the 'shelf space' for off-network programs" on the schedules of network affiliates in the top-50 markets.[44] But the Disney Coalition has a problem: "If the network restriction is eliminated, and network programming fills up the newly created shelf space on the top 50 network affiliates during the former access

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[42] HUTs may well have been restored to those levels before the 1984/85 season, but King World apparently did not have access to Nielsen HUT data for seasons prior to 1984/85.

[43] Although the Nielsen data for years subsequent to 1984/85 show small declines in HUTs during the late 1980's, those declines were apparently attributable to changes in Nielsen sampling procedures during the late 1980's. See, e.g., Television in the Peoplemeter Age, *Broadcasting*, Sept. 7, 1987, at 35 (peoplemeter numbers reflected lower HUTs overall than previous Nielsen Television Index, utilized for the previous 30 years); 1987 Ushers in the People Meter Era Television Audience Measurement, Jan. 5, 1987, at 59. See also King World Reply Comments. In any event, insofar as HUT levels had recovered to their pre-PTAR levels by the 1984/85 season, subsequent HUT declines during the late 1980's obviously resulted from intervening factors and cannot rationally be attributed to a rule adopted more than 15 years earlier.

[44] See Disney Coalition Comments at 35.

period, then the benefits [to off-network syndicators] from the removal of the off-network restriction would simply vanish."[45] Indeed, total repeal of PTAR would be contrary to the economic interests of off-network syndicators because the networks might well then begin programming the access hour in all markets, thus reducing the "shelf space" for off-network (as well as first-run syndicated) programming in markets 51-211, as well as markets 1-50.[46]

For this reason, the Disney Coalition is forced by its own economic interests to advocate repeal of the off-network aspect of PTAR but preservation of the prohibition on the networks from programming more than three hours of prime time in the top-50 markets. This unabashedly self-serving position is indefensible as a matter of public policy. In trying to defend it, the Disney Coalition stands the purpose of the rule on its head and totally ignores the implications of repeal for the new networks. The Disney Coalition's position, it should be noted, is supported by little more than its own rhetoric and a completely theoretical discourse on organizational efficiency and hierarchical modes of contracting, bereft of any factual underpinning.[47]

The core purpose of PTAR was to open a portion of the prime time schedules of major market affiliates to first-run syndicated programs, thus providing a "healthy impetus to the

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45 Id.

46 As noted in the LECG Report, because it is not economically practical for the networks (or anyone else) to produce and distribute programming to broadcast television stations without the top-50 markets (which cover 66.7% of viewer households nationwide) as a base, the networks voluntarily stopped programming the access hour in all markets following the adoption of PTAR. See LECG Report at 86-88.

47 See Coalition Economic Analysis.

development of independent program sources," and new sources of programming for independent stations.[48] The Commission explained the purpose of the off-network prohibition:

> Off-network programs may not be inserted in place of the excluded network programming; to permit this would destroy the essential purpose of the rule to open the market to first run syndicated programs.[49]

In rejecting calls for elimination of the off-network restriction in 1975, the Commission remained stalwart:

> It is readily apparent that elimination of this restriction would lead to a large-scale incursion into cleared time by use of off-network material, sharply reducing the availability of time to sources of new non-network material... [T]he drastic impact on our objective of encouraging the development of new material would obviously be completely disserved.[50]

These concerns remain true today. Having barred network programming during the access hour so as to foster a diversity of program sources and outlets, permitting network affiliates to fill that hour with network reruns would defeat a fundamental purpose of the rule.

The Disney Coalition tries to justify this result by urging that repeal of the off-network restriction would maximize affiliate autonomy, but that has never been the purpose of the rule, nor should it be. The purpose of the rule is to foster diversity and competition in the television industry. The Disney Coalition fails to explain how allowing affiliates to exercise their "autonomy" by choosing to show network reruns in place of the first-run syndicated

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48 See 1970 Order at 395.

49 Id.

50 Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, 50 FCC 2d 829, 848 (1975).

programming, local news and other local programming that they now broadcast during the access hour would enhance diversity.[51]

Moreover, much of the benefit of the rule in boosting the performance of independent stations -- leading to the expansion of the independent television sector and making emerging television networks possible -- would be lost if the off-network restriction were repealed. Based on historical ratings information gathered for several years preceding and following the adoption of PTAR, LECG predicts steep ratings declines for independent stations during the access period and the first hour of prime time if PTAR were repealed. LECG predicts that, if PTAR were repealed, independent stations' ratings will drop an average of 58% during the second half of the access hour and 67% during the 1-1/2 hour period consisting of the second half of the access hour and the first hour of prime time.[52] It predicts that about 45% of those ratings declines would result from repeal of just the off-network restriction.[53]

In sum, there is no public policy justification for repealing the off-network restriction, which has always been and remains an integral part of the rule.

B. The Benefits of PTAR Are Not "Sufficiently Secure" That They Will Survive Repeal of the Rule.

The Disney Coalition is dead wrong that the benefits of PTAR are "sufficiently secure that elimination of the restriction will not place them in danger."[54] The Disney Coalition

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[51] See Disney Coalition Comments at 36.

[52] See LECG Report at 48.

[53] See id. at 51. LECG states that there are reasons to believe that repeal of the off-network provision would account for a much higher ratings decline than is predicted by its model because the importance of the off-network restriction, relative to the three-hour restriction, has increased since PTAR was first implemented. See id. at 52.

[54] See Disney Coalition Comments at 11.

admits that UPN and WB are "only 'incipient' networks" that currently provide two and four hours of prime time programming per week, respectively, and do not have coverage remotely comparable to that of ABC, CBS, NBC or even Fox.[55] Yet both the Disney Coalition and its economists totally ignore the impact of repeal of the off-network restriction on those fledgling enterprises.

The Disney Coalition's arguments that the independent television sector and first-run syndication are robust enterprises that can weather repeal of PTAR without injury are also flawed in important respects. As to the independent stations, the Disney Coalition asserts that "only 120" independent stations in the top 50 markets are "viable purchasers of syndicated programming," and that only 21 of those are "not part of a larger group of stations."[56]

It is difficult to verify the Disney Coalition's calculations because it does not list the stations it has included and excluded, but the numbers it throws out have no meaning. The 120-station figure is suspect because the Disney Coalition states that it has excluded so-called "marginal stations" with low ratings that cannot afford to purchase the "most popular first-run syndicated and recent off-network programs."[57] Viacom disagrees that these stations are "simply not relevant to the debate over PTAR"; they may now purchase less popular syndicated programming that may become unavailable to them or significantly more expensive if PTAR were repealed. Moreover, while these stations may not be big purchasers of syndicated fare boosting the bottom line of the Disney Coalition's members, they are nonetheless very relevant to new networks like UPN and WB, which need new affiliates to expand their network

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55 See id. at 8.

56 Id. at 24-25.

57 Id. at 24-25 n.71.

coverage.[58] And, if these "marginal stations" do become affiliated with one of the new networks, their bottom lines may improve sufficiently that they can purchase better syndicated programming.[59]

There is no basis whatsoever for suggesting that only 21 stations depend on access to syndicated programming because they are not part of a "larger group of stations." Clearly, the fact that an independent station is owned by a licensee that owns other stations or is affiliated with a new network that is providing two or four hours of prime time programming per week does not mean that the station does not rely on syndicated programming to fill its schedule. In short, the Disney Coalition's station numbers signify nothing.[60] Moreover, aggregate numbers of stations say nothing about the maturity and economic strength of <u>individual</u> stations.

As for the effect of repeal on first-run syndication, the Disney Coalition trots out its now familiar argument that the fact that affiliates in markets 51-100 purchase first-run programs signifies that affiliates in the top-50 markets will do so as well if PTAR were repealed. The complete fallacy of this argument has been demonstrated by LECG, and Viacom will not traverse this ground again.[61]

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58 <u>See</u> Viacom Comments at 9-15.

59 This is already happening. Since WVEU, Atlanta, became a UPN affiliate, for example, it has begun carrying the syndicated "Disney Afternoon," and Viacom has purchased "Martin," an off-Fox network series, for airing on WVEU after it consummates its acquisition of that station.

60 The Disney Coalition also argues that the majority of independent stations no longer suffer a UHF handicap because of cable carriage. Disney Coalition Comments at 26-28. As shown in Viacom's opening comments, LECG has already thoroughly discredited this argument and Viacom will not belabor the point here.

61 <u>See</u> Viacom Comments at 31-33; LECG Report at 59-63.

C. **The Disney Coalition Does Not Establish that the Off-Network Restriction Has Significantly Depressed Off-Network Syndication Revenues.**

Viacom has already demonstrated that the "collapsing back-end" argument repeatedly made by Disney and now reiterated by the Disney Coalition -- that the syndication revenues of off-network programs have declined substantially during the last few years because of PTAR -- is a myth.[62] The only other "evidence" that the Disney Coalition submits to support its claim are a few anecdotes which it asserts show the disparate syndication revenues of similar programs.[63]

The anecdotal information provided by the Disney Coalition reflects much more on the syndication appeal of the programs it mentions than on the effect of PTAR. As discussed in the Declaration of Steven Goldman, President of Paramount Pictures Corporation's Domestic Television Division, attached hereto as Exhibit A, Paramount's market research has shown that while a successful network run with relatively high ratings is a prerequisite to successful syndication of a series, high network ratings are not sufficient to assure successful syndication. There are many examples of programs with comparable network ratings where one program was successful in syndication and the other was not. As explained in Mr. Goldman's Declaration, these disparate track records often reflect the programs' demographic characteristics. In a nutshell, programs that are successful in syndication have, in addition to high network ratings, strong appeal among either men or teens and kids and low appeal in the

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62 See Viacom Comments at 33-35. In its comments, the Disney Coalition omits off-network syndication revenues in 1995, which reached a high-water mark and destroy its argument that the off-network back-end is "collapsing." See Disney Coalition Comments, Figure 5; Viacom Comments at 33-35 and Appendix J.

63 See Disney Coalition Comments at 18-21.

50+ demographic group.[64] Any program that appeals primarily to women or viewers over 50 and lacks secondary audience appeal is not likely to be successful in syndication, even if it has high network ratings.[65]

This pattern -- not the effect of PTAR -- explains why *Evening Shade* was unsuccessful.[66] *Evening Shade* had respectable network ratings but had a mostly female audience (55% women 18+), appealed heavily to older viewers who tend not to watch syndicated programming during early fringe and access (47% adults 50+), and had very low appeal among the male, teen and kids' demographic groups who do tend to watch syndicated programming during those time periods (17% men 18-49 and 11% teens/kids).[67] These demographic characteristics of the series, not PTAR, explain why that show was not syndicated successfully to broadcast stations.

Another series mentioned by the Disney Coalition, *Anything But Love*, has a somewhat different story, but its cancellation also had nothing to do with PTAR. When *Anything But Love* debuted for a 6-week try-out during 1989 in a time slot following *Roseanne*, it had solid ratings (19.0 rating/29 share). But when ABC brought the program back in the Fall of 1989, it moved the series to a different time slot with a weaker lead-in and it delivered much lower ratings for the entire 1989-90 season (10.8 rating/19 share). The show was dropped from ABC's schedule in the Fall of 1990, but re-launched in February 1991. It again delivered disappointing ratings for that season and 1991-92. The producer then cancelled it, realizing

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64 See Exhibit A.

65 Id.

66 See Disney Coalition Comments at 18-19.

67 See Exhibit A.

that its ratings were not strong enough to assure profitable syndication, particularly since the program was more expensive to produce than the average situation comedy. What does this have to do with the effect of PTAR? Absolutely nothing.

Viacom agrees that syndicators of some off-network shows -- the most popular shows -- might make more money if the Commission repealed PTAR because they could then sell those programs at higher prices to the deep-pocketed network affiliates in the major markets. But maximizing syndicators' profits for those shows is not the Commission's function. And the Disney Coalition has not made its case that off-network syndicators are being "squeezed" by PTAR or that they have little incentive to invest in network programs.[68] Indeed, 1995 established a high-water mark for off-network syndication sales, led by Disney's hugely successful sale of *Home Improvement*.[69] And recent press reports indicate that the upfront syndication ad market -- which generates revenues to both stations and syndicators that will fuel the off-network syndicated programming market -- is booming, with double-digit rate increases this year.[70] That bodes well for off-network syndicated programming.

Moreover, contrary to the Disney Coalition's claim, repeal of PTAR is not likely to induce producers to invest more in network programs than they otherwise would in hopes of recouping their additional investment years later in syndication, which is always a long shot.

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68 It should be noted that the syndicated programming market -- both off-network and first-run -- developed and matured during the past 25 years with PTAR in place. Many companies, including Disney, did not even enter the syndication market until after PTAR was a fact of life in the syndication business. In light of this fact, Disney's contention that off-network syndicators cannot operate profitably with PTAR in effect is somewhat puzzling.

69 See Viacom Comments at 33-35 and Appendix J.

70 See McClellan, Upfront Syndication Nears $1.8 Billion, *Broadcasting & Cable*, Apr. 24, 1995, at 8. *Broadcasting & Cable* states that syndication rates may have increased in part out of "concern that network ad prices will skyrocket this year." Id.

Indeed, since there are more network situation comedies on the air now than there were a few years ago, there is no evidence that PTAR has had a depressing effect on the production of network series.[71]

In short, as shown in Viacom's opening comments, the "collapsing back-end" is a myth.

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[71] See Viacom Comments, Appendix K.

EXHIBIT A

I, Steven Goldman, declare the following:

1. I am the President, Domestic Television Division, and Executive Vice President, Television Group, Paramount Pictures Corporation ("Paramount"), which is owned by Viacom International, Inc.

2. Paramount has conducted market research into the factors that foreshadow the success of a television program in syndication and, conversely, those factors that foreshadow failure. In conducting this research, Paramount examined programs that had been successful (*i.e.*, highly rated) while on the network and that had generated enough episodes to syndicate. Paramount then separated these programs into two groups, based on whether they were successful or unsuccessful in syndication, and looked for patterns in each group.

3. A pattern emerged. The successful programs had (1) strong appeal among either (a) men or (b) teenagers and children and (2) low appeal among viewers over 50. In contrast, the unsuccessful shows typically had strong appeal among women and older viewers and lacked a secondary audience appeal. The following tables illustrate these demographic patterns for eight programs while they were on the network and subsequently in syndication:

TABLE 1

Program — Network Audience Composition

Program	% Total Men	% Men 18-49	% Total Women	% Women 18-49	% Teens/ Kids	% Total 50+	Syndication Success or Failure
HAPPY DAYS	24	18	33	24	42	16	SUCCESS
SIMPSONS	28	26	30	25	44	6	SUCCESS
BEWITCHED	22	15	30	23	47	15	SUCCESS
MASH	32	19	40	24	27	29	SUCCESS
MARY TYLER MOORE	28	16	41	24	32	29	FAILURE
BOB NEWHART	29	16	44	24	27	33	FAILURE
MURPHY BROWN	32	22	55	35	6	31	FAILURE

TABLE 2

Program — Syndicated Audience Composition

Program	% Total Men	% Men 18-49	% Total Women	% Women 18-49	% Teens/ Kids	% Total 50+	Syndication Success or Failure
HAPPY DAYS	24	19	29	22	48	12	SUCCESS
SIMPSONS	29	26	26	24	44	6	SUCCESS
BEWITCHED	16	12	27	20	57	11	SUCCESS
MASH	36	25	39	26	25	24	SUCCESS
MARY TYLER MOORE	30	18	46	28	24	30	FAILURE
BOB NEWHART	31	20	47	30	23	28	FAILURE
MURPHY BROWN	31	24	48	36	21	20	FAILURE

4. In sum, Paramount concluded, based on its research that, although high network ratings are generally a prerequisite to syndication success, high network household ratings do not assure the success of a program in syndication. The program must also appeal to certain demographic groups. Network programs that appeal primarily to women or viewers over 50 are unlikely to succeed in syndication even if they have high network household ratings. Station executives who purchase these programs now recognize these fundamental principles and apply many of them in buying off-network sitcoms.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 25, 1995.

Steven Goldman

Steven Goldman
President, Domestic Television Division,
Executive Vice President,
Television Group,
Paramount Pictures Corporation